

**Bay Delta Conservation Plan
Governance Working Group
Preliminary Draft Recommendations for Governance Structure**

This draft implements the Steering Committee's Feb. 4th comments on a prior draft. It also reflects the workgroup's recommended directions on open issues in prior drafts, understanding that each member reserves the right to qualify, or change, such direction as the rest of the plan matures. As a matter of form, we have also sought to (i) better recognize the many statutes that may be related to the plan and (ii) break dense concepts into component elements.

Permittees

1. The Bay Delta Conservation Plan will be the basis for permits authorizing permittees to take listed species of fish and wildlife, and cause other environmental impacts, incident to Delta water operations and related covered activities. The permittees are those entities who will be legally responsible for compliance with the permits, including the conditions requiring implementation.
 - 1.1. A primary purpose and use of the plan will be compliance with the Endangered Species Act (ESA), California Endangered Species Act (CESA), and Natural Community Conservation Planning Act (NCCPA). A permittee will be: (i) a non-federal entity authorized under ESA section 10(a)(1)(B), NCCPA section 2835, and CESA section 2081, or (ii) the federal entity authorized under ESA section 7(a)(2), to take endangered or threatened fish and wildlife species incident to water operations and other covered activities, subject to the plan conditions.¹
 - 1.2. A permittee will also be the entity authorized to cause other environmental impacts incident to covered activities, under other applicable environmental statutes. These may include but are not limited to: California Water Code sections 1000 *et seq.* (water rights), Water Code sections 13000 *et seq.* (water quality), California Fish and Game Code sections 1600 and 5900 *et seq.* (fish screens, channel modification), and Clean Water Act section 404 (dredge and fill).
 - 1.2.1. A separate permit will likely issue under each such statute.

¹ USBR representatives have stated that "permittee" is not an accurate description of USBR's status under ESA section 7(a)(2). The Governance WG will find mutually agreeable terminology as we develop Chapter 7.

- 1.2.2. The Governance Workgroup anticipates that the plan will be designed to comply with the statutes listed in point 1.1 and will be consistent with the permitting obligations described in point 1.2.
 - 1.3. Each permittee will have the legal and financial capacities to:
 - 1.3.1. Perform those responsibilities assigned to it by permits. If responsibilities are jointly assigned to several permittees, each will have such capacity.
 - 1.3.2. Remedy inadequate (including untimely or ineffective) performance of the plan as permitted.
 - 1.3.3. Respond to changed circumstances that affect plan implementation.
 - 1.3.4. Modify the covered activities as may be necessary for continuing compliance with applicable laws.
 - 1.4. The permittees will have distinct responsibilities as specified in the plan (Chapter) and permits. The Governance Workgroup expects that these responsibilities will not be co-equal for each facility or other covered activity.
2. California Department of Water Resources (DWR) will be a permittee.
 - 2.1. The State of California, through DWR, will construct and own the new conveyance facility.
 - 2.2. Under existing authority, DWR constructed and owns the State Water Project's (SWP) existing Delta facilities, including the Banks Pumping Plant. It will seek and obtain permits to continue to operate such facilities in compliance with applicable environmental laws.
3. SWP and CVP Contractors will establish a Joint Powers Authority (Contractor JPA) in order to assist with plan implementation.
 - 3.1. The JPA will be a separate permittee, or otherwise will be a supporting entity (receiving coverage under DWR's permits) as described in point 9.
 - 3.2. The JPA's responsibilities will be contained or reflected in the plan, implementing agreement and permits.
4. U.S. Bureau of Reclamation (USBR) will receive incidental take and other regulatory authorizations under the statutes described in points 1.1 – 1.2.

- 4.1. USBR is expected to enter into an agreement with DWR to obtain capacity and other rights in the operation of the new conveyance facility. The Governance Workgroup expects that USBR and DWR will not have co-equal responsibilities for water operations.
- 4.2. Under existing authority, USBR owns Central Valley Project's (CVP) existing Delta facilities, including the Jones Pumping Plant. The Governance Workgroup expects that it will seek to obtain take and other regulatory authorizations consistent with the plan to continue to operate such facilities in accordance with applicable environmental laws.
- 5. Mirant will be a permittee for the purpose of its power operations.

Implementing and Supporting Entities

- 6. Each permittee will be an implementing entity responsible for implementing covered activities and conservation measures consistent with NCCPA section 2835, ESA section 7(a)(2), ESA section 10(a)(1)(B), or other permitting authorities.
 - 6.1. The plan, implementing agreement, or related agreement (such as described in point 4.1) will assign specific responsibilities to each implementing entity. The Governance Workgroup expects that such responsibilities will not be co-equal.
 - 6.2. Each implementing entity will have the legal and financial capacity to implement its assigned responsibilities.
 - 6.3. If non-permittees assist the implementing entities (as described in point 8), the permittees will retain regulatory responsibilities for implementation.
- 7. DWR and USBR will be designated as an implementing entity for the purpose of water operations, and JPA may be so designated. As stated in point 6.1, such responsibilities will not be co-equal and instead will be as specified in the plan, implementing agreement, or related agreement (such as described in point 4.1).
 - 7.1. DWR will be an implementing entity responsible for construction, operation, and maintenance of the new conveyance facility. It will continue to have responsibility for operation and maintenance of the Banks Pump Station and other State Water Project facilities.
 - 7.2. The Contractor JPA may be a permittee and implementing entity as described in point 3.2.

- 7.3. USBR will be an implementing entity responsible for operation and maintenance of the Central Valley Project facilities.
- 7.4. By April 2009, the Governance Workgroup will make a recommendation to the Steering Committee whether any other entity should be a permittee and implementing entity for water operations for conservation of fish and wildlife.
- 8. Entities other than permittees will assist implementing entities for conservation measures such as habitat restoration and management of other stressors.
 - 8.1. The plan, implementing agreement, or any combination will designate each such supporting entity and specify its tasks.
 - 8.2. Each such supporting entity will receive coverage for take of listed species or other environmental impacts, through the permittee's regulatory authorization.
 - 8.3. A permittee will oversee each such entity's performance of its responsibilities for plan implementation. The permittee will have authority to terminate such entity's responsibilities, if the entity does not perform adequately.
 - 8.4. Designation of a supporting entity will be a function of its jurisdiction, expertise, or other practical capacity to increase the likelihood of timely and successful plan implementation.
- 9. Supporting entities for the purpose of habitat conservation and management of other stressors will include:
 - 9.1. Delta Conservancy, if established as proposed by Delta Vision. The Delta Conservancy will be able to accept public funds directly or through another State or Federal agency for such implementation.
 - 9.2. Other public agencies and private entities that have jurisdiction, capacity, and expertise to perform such measures in a cost-effective, reliable, and timely manner.

BDCP Implementation Council

- 10. An implementation Council will be formed for the purposes of (i) consulting with the implementing entities and (ii) non-binding dispute resolution between members regarding the implementation of the plan. Both functions will be advisory to the implementing entities.

- 10.1. The plan will specify eligibility criteria for membership. Such criteria will cover: (i) permittees and any other implementing entities; (ii) permitting agencies (in ordinary or *ex officio* capacity, as they may specify); (iii) other members of the BDCP Steering Committee; (iv) Delta Counties and other local governments; and (v) other stakeholders whose assistance will increase the likelihood of success in plan implementation.
- 10.2. The plan will specify procedures for these functions. These procedures will be designed and implemented to be efficient and specifically to permit the implementing entities to timely implement permit obligations. These procedures may vary by plan element.
- 10.3. Such procedures will fully preserve the existing authorities of any member, including implementing entities and regulatory agencies, to act as required by such authorities. These entities will not delegate any such authorities to the Implementation Council.
- 10.4. Such procedures will comply with applicable requirements of open meeting laws.
- 11. The implementing entities will periodically report to and otherwise consult with other council members on (i) past activities and (ii) upcoming plans for water supply operations, conservation measures, and adaptive management.
 - 11.1. Such consultation will permit the implementing entities and other members to exchange information, comments and recommendations.
 - 11.2. The purpose of such consultation is to maximize mutual understanding of plan implementation and minimize risk of disputes.
- 12. The Council will use non-binding procedures for dispute resolution related to adequacy of plan implementation, including the performance of adaptive management.
 - 12.1. Such procedures will be designed and implemented to minimize the risk and scope of litigation related to plan implementation, while fully reserving each council member's legal rights.
 - 12.2. Dispute resolution procedure will apply proactively. Thus, if the plan provides that an operational decision will be made on a seasonal basis, the procedure will apply in advance of that season. If an operational decision will be made on a daily or other real-time basis, the procedure will concern

the implementing entity's approach to such decisions (e.g., how is it interpreting applicable criteria?), rather than any particular day's decision.

Plan Implementation and Permit Compliance

13. The implementing entities will implement the plan as required by the take authorizations and related permits.
 - 13.1. The plan will contain procedures for routine and non-routine adaptive management of its conservation measures. See Chapter 4.6, Figure 3.X.1. These procedures will specify: (i) triggers for such potential changes, (ii) substantive criteria which the implementing entities will apply, and (iii) permitting agencies and other entities with whom the implementing entities will consult.
 - 13.2. The plan will contain flow measures for conservation of listed fish and wildlife. The Governance Workgroup expects that some such measures will be variable by water year-type, season, or a real-time basis. The plan will specify effective procedures for such variable flows, including (i) triggers, (ii) substantive criteria, and (iii) obligations for consultation or approval.
14. The plan will be enforceable and enforced under the permitting statutes listed in points 1.1 – 1.2.
 - 14.1. The plan will be a condition of each permit issued for covered activities.
 - 14.2. Water rights for water operations will be subject to enforcement under the California Water Code, with respect to water rights and water quality impacts. This statute applies to all permittees regardless of legal status as a federal or non-federal entity. Other statutes, such as the ESA, will apply differently to permittees, depending on federal status.
 - 14.2.1. It is our preliminary view that use of the Coastal Zone Management Act (CZMA), as recommended by the Delta Vision Task Force, is not necessary to assure adequacy or consistency of plan implementation by federal and non-federal permittees. The Governance Workgroup does not express a view about the use of the CZMA for regional governance.
 - 14.2.2. It is our preliminary view that existing statutes, as listed in points 1.1 – 1.2, provide sufficient regulatory authority to assure plan implementation as a condition of permits issued under those statutes.

- 14.3. The Governance Workgroup recommends that each permit necessary for plan implementation should recognize that the covered activities, including water operations, are governed by other permits. To the extent feasible, each permit should provide for integrated approach to compliance with the several permits, such as routine coordination between the permitting agencies regarding the status of plan implementation, while recognizing that each permitting agency has independent statutory authority.
- 14.4. Major plan modification will require amendment of all applicable permits.
15. By April 2009, the Governance Workgroup will make a recommendation to the Steering Committee whether contracts, water or property rights, or other non-permit mechanisms should be used to govern real-time operations to advance species recovery and water supply reliability beyond what otherwise will be accomplished by permits.

Coordinated Governance

16. The plan will contain appropriate provisions so that governance of plan implementation is compatible with the overall governance of Delta natural resources that may be established pursuant to the recommendations of Delta Vision Task Force or otherwise.
 - 16.1. Each permit under the statutes listed in points 1.1 – 1.2 will be enforced by the permitting agency.
 - 16.2. Coordination between any regional government and the permitting agencies will thus concern matters outside of permit compliance.
17. By separate agreement concurrent with plan adoption, the permittees and other stakeholders may agree to provisions to help advance coordinated regulation of all facilities and activities affect achievement of plan goals or performance of plan responsibilities in the Delta watershed.